

# EUROPEAN EQUALITY LEGISLATION: THE LEGAL FRAMEWORK AND ITS LINKS WITH NATIONAL LAW

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## INTRODUCTION

- The legal framework for protecting anti-discrimination rights is incomplete: no uniform *minimum* standard of protection within the Union
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Non-discrimination and equal opportunities: a renewed commitment {SEC(2008) 2172} /\* COM/2008/0420 final \*/:

“Despite these achievements, the fact remains that the European legal framework for tackling discrimination is not yet complete. In particular, whilst some Member States have taken action prohibiting discrimination on grounds of age, sexual orientation, disability and religion or belief outside the area of employment, there is no uniform minimum level of protection within the European Union for people who have suffered such discrimination.”

## I. THE RIGHT TO EQUALITY IN UNION LAW

### In the treaties before the Treaty of Lisbon

- Non-discrimination was linked to the protection for exercising economic activities in the common market, not to implementing social justice
- It was case law from the Court of Justice of the European Union (CJEU) that led to broader legal protection for European citizens in this field:

#### ***Defrenne I, CJEU, 8 April 1976, 43/75:***

*"The principle that men and women should receive equal pay (...), is one of the foundations of the community . It may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals (...)"*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### In the treaties before the Treaty of Lisbon

#### **Article 13 TEC (now Article 19 TFEU)**

- *"Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*
- ✓ Article added when the Treaty of Amsterdam came into force in 1997.
- ✓ A very important article in the EU's fight against discrimination, as it allowed the Community to adopt anti-discrimination measures on new grounds: race or ethnic origin, religion or beliefs, disability, age or sexual orientation.
- ✓ Article subsequently amended by the Treaty of Nice to permit adoption of incentive measures by a qualified majority in Council
- ✓ Retained

## I. THE RIGHT TO EQUALITY IN UNION LAW

### **The Treaty of Lisbon**

The Treaty of Lisbon, signed on 13 December 2007, triggers a mosaic of anti-discrimination provisions.

The Treaty of Lisbon transforms the principle of non-discrimination into a European Union (EU) objective.

Major norms established in the TEU and TFEU are reflected in a body of provisions enshrined in the European Charter of Fundamental Rights.

## I. THE RIGHT TO EQUALITY IN UNION LAW

- **The Treaty of Lisbon**
- *TEU*
- *TFEU (The Treaty on the Functioning of the European Union)*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### *TEU*

#### *Article 2 TEU*

- The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### *TEU*

#### *Article 3 (3) TEU*

(The Union) shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### **TEU**

#### **Article 6 TEU:**

- ❖ *The EU's Charter of Fundamental Rights has the same legal status as the Treaties;*
- ❖ *The Union will become a party to the European Convention on Human Rights (ECHR);*
- ❖ *The fundamental rights guaranteed by ECHR form part of Union law in the form of general principles.*

1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted on 12 December 2007, which shall have the same legal value as the Treaties....*

2. *The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### **TFEU**

#### **Article 10 TFEU**

Contains a horizontal provision designed to mainstream the fight against discrimination by including it in all Union policies and activities.

- *“In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### TFEU

#### Article 10 TFEU

- ✓ Important step forward from previous Treaties, where the principle of non-discrimination was only linked to protecting the exercise of economic activities in the common market.
- ✓ This article revealed that the principles of equality and non-discrimination went beyond simple affirmation, serving a teleological aim in all policies and activities pursued by the European institutions.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### TFEU

#### Article 19 TFEU (formerly Article 13 TEC)

- **Provides for a special legislative procedure for adopting necessary measures to combat all forms of discrimination. Constraint of unanimity:**

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

- **Provides for an ordinary legislative procedure for adopting the basic principles of incentive measures by the Union to help fight all forms of discrimination:**

2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### TFEU

#### Article 19 TFEU (ex art. 13 TEC)

- ✓ This is a provision with a pronounced social purpose which implies pro-active measures by the Union designed to achieve an effective system of social justice, in the interests of everyone on EU territory, regardless of whether they are exercising an economic activity in the single market.
- ✓ One constraint that pre-dates the Treaty of Lisbon remains in place: the unanimous procedure that hinders the flexibility required to make the options set out in this article effective.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### TFEU

#### Article 19 TFEU (formerly Article 13 TEC)

✓ Strict interpretation. Article does not have direct effect. A positive act must be passed in order to permit concrete application (as confirmed by the General Court in 2004 in a case concerning EU public servants: CFI, 28 October 2004, Lutz Herrera v. Commission, T-219/02 and T-337/02, p. 89)

✓ Also in 2010, CJEU proceedings begin in the Küçükdeveci case, C-555/07, 19 January 2010, p. 51 and 53: the Court confirms that when national legislation does not permit an interpretation that complies with Community legislation on non-discrimination, the national court must disapply the contested national law :

*"In those circumstances, it for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle."* (p. 51)

*"The need to ensure the full effectiveness of the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, means that the national court, faced with a national provision falling within the scope of European Union law which it considers to be incompatible with that principle, and which cannot be interpreted in conformity with that principle, must decline to apply that provision, without being either compelled to make or prevented from making a reference to the Court for a preliminary ruling before doing so."* (p. 53)

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The Charter of Fundamental Rights of the European Union

- The Charter of Fundamental Rights of the European Union was adopted in the year 2000. It lists human rights inspired by constitutional rights in the Member States, the ECHR and universal human rights conventions such as the Convention on the Rights of the Child.
- This is a European Bill of Rights which has the same status as the Treaties, as stated in Article (1) TEU: *“The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The Charter of Fundamental Rights of the European Union

- **TITLE III**

#### EQUALITY

- **ARTICLE 20.- Equality before the law**

*Everyone is equal before the law.*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The Charter of Fundamental Rights of the European Union

- **ARTICLE 21 Principle of non-discrimination**

1. *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
2. *Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*

## THE RIGHT TO EQUALITY IN UNION LAW

### The scope of the Charter

#### Article 51

1. *The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*
2. *This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The scope of the Charter

- The Charter does not grant the EU general powers enabling it to intervene if national bodies infringe fundamental rights.
- The Charter only applies to Member States when they are applying EU law.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The scope of the Charter

- Private citizens can apply to the courts if they believe that Union law or national law applying it fails to respect the principle of equality enshrined in the Charter of Fundamental Rights.
- National courts can ask the European Court of Justice to rule on the correct interpretation of EU legislation by making a reference for a preliminary ruling as provided by Article 267 TFEU.

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The scope of the Charter

- ***CJEU (Grand Chamber) judgment of 26 February 2013, C-617/10, Åkerberg Fransson: in a case where there was no European legislation directly at issue, the Court ruled***
- 29. *That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (on this latter aspect, see judgment of 26 February 2013, Melloni, C-399/11, paragraph 60; not yet published in ECR).*

## I. THE RIGHT TO EQUALITY IN UNION LAW

### The scope of the Charter

#### ***CJEU (Grand Chamber) judgment of 1 March 2011, C-236/09, Test-Achats:***

- *In this case, the Court invalidated an exception set out in Article 5 (2) of Directive 2004/113/EC that allowed Member States to authorise proportional differences in insurance premiums and benefits where sex was a determining factor in risk assessments;*
- *this exception was held to be incompatible with the aim, contained in the Directive and in the Charter, of setting fee schedules for policy holders independently of sex;*
- *in its reasoning, the Court accepted the arguments put forward by the consumer group and ruled that the exception contained in Article 5 of the Directive was contrary to the fundamental principle of gender equality as recognised in the EU Treaty.*

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### • Article 14 ECHR

#### Prohibition of discrimination

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### Scope of the equality principle: Article 14 is not an autonomous right

- An infringement of the right to non-discrimination can only be invoked in connection with another substantive right set forth in the Convention. The Convention does not allow for complaints based exclusively on a violation of this article.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### • Protocol no. 12:

- Protocol no. 12 (2000), which has not yet been ratified by all EU Member States, extends the scope of the prohibition of discrimination and guarantees equal treatment in the exercise of all rights (including those derived from national legislation).
- The Explanatory Report states that the adoption of this Protocol reflects a will to strengthen protection from discrimination, which is seen as a fundamental element in safeguarding human rights.
- Its scope is broader than that of Article 14, which only concerns rights recognised by the ECHR.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### ARTICLE 1 of Protocol 12

#### General prohibition of discrimination

1. *The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
2. *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.*

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### Relationship between the two systems of protection

- The EU is not a party to ECHR. Consequently its acts cannot be indicted before the European Court of Human Rights (ECtHR).
- Nevertheless, the European Commission on Human Rights and the European Court of Human Rights have declared a number of principles which must be taken into account when defining the relationship between the two systems.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

### Principles established by ECtHR/European Commission on Human Rights on the relationship between the system derived from EU legislation and the system derived from ECHR

- *Responsibility of a State which signs up to two treaties successively*

As far back as 1958 the European Commission on Human Rights ruled that “if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any resulting breach of its obligations under the earlier treaty (Kahn v. Germany, no. 235/56, Commission decision of 10 June 1958).

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Principles established by ECtHR/European Commission on Human Rights on the relationship between the system derived from EU legislation and the system derived from ECHR

- ***Inadmissibility of applications against the European Communities***

In a decision on 10 July 1978, the Commission held that applications against the European Communities were to be declared inadmissible as being directed against a “person” not party to the Convention.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Principles established by ECtHR/European Commission on Human Rights on the relationship between the system derived from EU legislation and the system derived from ECHR

***Possibility of bringing a case against a State for national measures giving effect to Community law which are contrary to the fundamental rights contained in ECHR***

In a decision on 9 December 1987, the European Commission on Human Rights admitted this possibility by recognising the possibility of bringing a case against the Member State that committed the infringement.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Principles established by ECtHR/European Commission on Human Rights on the relationship between the system derived from EU legislation and the system derived from ECHR

- *The protection of fundamental rights provided by Community law held to be “equivalent” to that provided by the Convention system*

In “Bosphorus Airways v. Ireland” on 30 June 2005, the ECtHR held that it was not necessary to examine whether the measure had been proportionate to the aims pursued, given that “the protection of fundamental rights by Community law [is] ... “equivalent” ... to that of the Convention system” (§ 165).

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Principles established by ECtHR/European Commission on Human Rights on the relationship between the system derived from EU legislation and the system derived from ECHR

### Europeanisation of the right to equality?

- There are strict relationships between EU law and ECHR-based law.
- By becoming a party to ECHR, which it must now do by virtue of the Treaty of Lisbon (Article 6 (2)), the EU will complete the architecture for protecting fundamental rights by granting ECtHR jurisdiction to review acts of the Union.
- The CJEU draws on ECHR in determining the impact of human rights on EU legislation.

### Constraints:

- Nevertheless, private individuals wishing to institute proceedings against the EU for an infringement of human rights will not be able to apply directly to the ECtHR. They will have to go through the national courts, who – if they believe they are indeed dealing with an infringement of this nature – will be able to make a reference for a preliminary ruling to the CJEU.



### • **III. THE RIGHT TO EQUALITY IN INTERNATIONAL CONVENTIONS**



### • **III. The right to equality in international conventions**

In particular the international conventions adopted:

- in the United Nations (UN) framework,
  - in the International Labour Organisation (ILO) framework.
- 
- These are multilateral conventions that have been ratified by all EU Member States and in some cases by the EU itself, which has implications for how they are applied in the EU's legal system.
  - These conventions govern the right to equality in general ways, but also in specific ways with regard to different groups or situations that are to be protected
  - These conventions have built a system of protection around the rights they enshrine.

### III. The right to equality in international conventions of the United Nations

- In the UN framework, we can distinguish between two types of international convention:
  - **Multilateral conventions of a general nature** with regard to fundamental rights, guaranteeing equality for all:
    - Universal Declaration of Human Rights of 1948
    - International Covenant on Civil and Political Rights of 1966 (ICCPR)
    - International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR)
  - **Specific multilateral conventions** guaranteeing equality for specific groups or in specific situations and requiring specific protection

#### Multilateral conventions of a general nature

##### 1. *Universal Declaration of Human Rights of 1948*

- **Article 1: Contains an abstract declaration of equality:**  
*"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*
- **Article 2: Broadly sets out prohibited grounds for discrimination**  
*"1. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*  
  
*2. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."*

## Multilateral conventions of a general nature

### 1. Universal Declaration of Human Rights of 1948

#### Article 7: Equality before the law:

*"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."*

#### Article 21: Equality of access to public functions and exercise of the right to vote:

*"2. Everyone has the right of equal access to public service in his country.*

*3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

#### Article 23 (2): Equal pay:

- *"Everyone, without any discrimination, has the right to equal pay for equal work."*

## Multilateral conventions of a general nature

### 2. International Covenant on Civil and Political Rights of 1966

#### Article 2 (1): Extends the prohibition of discrimination to all rights recognised by the Covenant and lists the prohibited grounds of discrimination:

*"1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

#### Article 3: Specific affirmation of gender equality:

*"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."*

#### Article 14 (1): Equality before the courts:

*"All persons shall be equal before the courts and tribunals [...]"*

## Multilateral conventions of a general nature

### 2. International Covenant on Civil and Political Rights of 1966

- **Article 23 (4): Equality in marriage**  
*“States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.[...]”*
- **Article 24 (1): Equality for children:**  
*“Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”*

## Multilateral conventions of a general nature

### 2. International Covenant on Civil and Political Rights of 1966

- **Article 25: Equal access to public services and exercise of the right to vote**  
*“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [...]*
  - b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*
  - c) To have access, on general terms of equality, to public service in his country.”*
- **Article 26: Equality before the law**  
*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

## Multilateral conventions of a general nature

### 3. International Covenant on Economic, Social and Cultural Rights of 1966

- **Article 2 (2): Extends the prohibition of discrimination to all rights recognised by the Covenant and lists the prohibited grounds of discrimination**  
*“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*
- **Article 3: Gender equality**  
*“The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”*

## Multilateral conventions of a general nature

### 3. International Covenant on Economic, Social and Cultural Rights of 1966

- **Article 7: Equal pay and promotion for men and women**  
*“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*
  - a) Remuneration which provides all workers, as a minimum, with:*
    - i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; [...]*
    - c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”;*
- **Article 10 (3): Prohibition of discrimination on grounds of parentage**  
*“Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions [...].”*

## Multilateral UN conventions specific to groups or situations requiring special protection

- The Equal Remuneration Convention of 1951
- The Convention against Discrimination in Education of 1960
- The International Convention on the Elimination of All Forms of Racial Discrimination of 1965
- The Convention on the Elimination of Discrimination against Women of 1979
- The International Convention on the Rights of the Child of 1989
- The Convention on the Rights of Persons with Disabilities of 2006

## Multilateral UN Conventions: system of protection

- All the UN Conventions mentioned here provide for a similar system of protection based on the following elements:
  - Non-judicial review: every Convention provides for a “Committee” of experts, appointed by the governments of UN member countries, who must act independently at all times to protect the rights guaranteed by the Convention;
  - Review mechanism:
    - Examination of the reports submitted by countries describing how the rights concerned are protected on their territory;
    - Resolution of complaints brought by one party against another;
    - Resolution of complaints brought by individuals against a country.

## The right to equality in conventions of the International Labour Organisation (ILO)

- These are specific conventions whose scope is limited to the world of employment in the broader sense.
- There is one general convention along with different conventions on specific questions.

## The right to equality in conventions of the International Labour Organisation (ILO)

- **Discrimination (Employment and Occupation) Convention (Convention no. 111 of 1958)**

Article 1:

*"1. For the purpose of this Convention the term discrimination includes:*

*(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;*

*(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.*

*2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."*

## The right to equality in conventions of the International Labour Organisation (ILO)

- Equal Remuneration Convention (Convention no. 100 of 1951)
- Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Convention no. 156 of 1981)
- The review mechanism is similar to the one described above for UN Conventions. However, the ILO does not have specific committees to review each of its conventions, and the application of all of these is safeguarded by a single Committee of Experts.

## Relationship between international equality conventions and the EU's legal system

We must distinguish between two different situations:

- The relationship with international conventions concluded by the EU and to which the EU is a party:

So far the only UN Convention concluded by the EU in its own name is the Convention on the Rights of Persons with Disabilities of 2006 [approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009.

- The relationship with international conventions to which Member States are parties, but not the EU

Currently most of the conventions listed above

## The relationship with international conventions concluded by the EU to which the EU is a party

- This relationship is founded above all on Article 216 TFEU:

*“1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.*

*2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”*

- From this case law has derived the following principles:
  - primacy of international conventions over secondary law
  - non-primacy of international conventions over original law

## The relationship with international conventions concluded by the EU to which the EU is a party

- **Secondary law:** primacy of international conventions and requirement for consistent interpretation:

In accordance with Article 216 (2) TFEU, when the EU signs international agreements, the EU institutions must respect these agreements, which take precedence over acts of the Union.

Because international agreements ratified by the Union take precedence over provisions of secondary law, these provisions must be interpreted consistently with the international agreements.

(See CJEU judgments of 21 December 2011, *Air Transport Association of America et al.*, C-366/10, p.50; 22 November 2012, *Digitalnet et al.*, C-320/11, C-330/11, C-382/11 and C-383/11, p. 39, and 11 April 2013, *HK Danmark*, C-335/11 and C-337/11, p. 29)

In this sense, the CJEU's judgment of April 2013 in *HK Danmark*, C-335/11 and C-337/11, interpreted Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation in the light of the United Nations Convention on the Rights of Persons with Disabilities [approved on behalf of the EC by Council Decision 2010/48/EC of 26 November 2009]

## The relationship with international conventions concluded by the EU to which the EU is a party

- **Original law:** non-primacy of international conventions
- The primacy which international treaties have over the law of the Union does not apply to primary (original) law, nor does it apply to the general principles, which include the principle of respect for fundamental rights.
- This interpretation is confirmed by Article 218 (11), which says that an international agreement cannot enter into force if the CJEU finds it incompatible with the Treaties of the Union, unless the international agreement is amended or the Treaties are modified.
- (cf. the CJEU judgment of 3 September 2008, Kadi and Al Barakaat International Foundation/Council and Commission, C-402/05 P and C-415/05 P, p. 308 and 309)
- The CJEU accordingly annulled a Council decision approving an international agreement after examining its internal legality in the light of the agreement and verifying the violation of a general principle of Union law, viz. the general principle of non-discrimination (judgment of 10 March 1998, Germany v. Council, C-122/95, ECR. p. I-973, annulling Council Decision 94/800/EC of 22 December 1994 on the conclusion on behalf of the Community of the Framework Agreement on Bananas with the Republic of Costa Rica, the Republic of Colombia, the Republic of Nicaragua and the Republic of Venezuela).

## Relationship between the EU system and international conventions concluded by Member States to which the EU is not a party

- International equality conventions concluded by Member States to which the EU is not a party also generate effects for the EU's legal system.
- Thus, in accordance with Article 6 (3) TEU:
- *"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."*
- The international equality agreements listed above to which the EU is not a party also contribute to defining the right to equality more precisely in as much as they form part of the "constitutional traditions common to the Member States".
- Consequently, when courts of the Union or national courts apply the law of the Union they can invoke and apply these international conventions – not directly, but insofar as the latter express general principles of the Union's law.

## Relationship between international conventions on equal treatment and the legal systems of Member States

- The relationship between international conventions on equal treatment and the legal systems of Member States is governed by national law, not the law of the Union.
- Case-law has confirmed this with regard to the ECHR:
- “In a conflict between national law and the ECHR, it is to be remembered that whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union’s law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.” (see CJEU judgments of 24 April 2012, Kamberaj, C-571/10, p. 62 and 26 February 2013, Åklagaren, C-617/10, p.44)
- This case-law can likewise be applied to international equality conventions and national legal systems.

**SER DIFERENTE NO ES UN PROBLEMA**



**EL PROBLEMA ES SER TRATADO DIFERENTE**  
*no más discriminación*